Malayan Banking Bhd v Fu Xing Aluminium dan Kaca Sdn Bhd

HIGH COURT (IPOH)
BALIA YUSOF J
15 NOVEMBER 2006

Land Law — Charge — Order for sale — Application for — Failure to provide breakdown of amount outstanding — Charge inconsistent with amount claimed — Whether 'cause to the contrary' proved- National Land Code 1965, s 256(3)

Land Law — Charge — Notice of demand — Failure to comply with demand notice and Form 16D notice — Whether any 'cause to the contrary' — National Land Code 1965 s 256(3)

On 12 August 1999, the defendant's land was charged to the plaintiff as a security for the repayment of all monies owing to Malayan Banking Berhad for the facilities provided to the defendant totaling RM3,750,000. In issuing the notice of default with respect to the charge in Form 16D, the plaintiff indicated that the amount due and owing as at 31 August 2003 was RM3,862,530.35 and the prescribed interest rate was at 2.25% pa above the base lending rate on daily rest. The plaintiff also imposed a penalty interest of 1% pa over and above the prescribed interest rate on the entire outstanding amount from the date of default until full settlement subject to a minimum charge of RM5. Later, the plaintiff applied for an order for sale and the defendant claimed that the application was bad in law. The defendant argued that the Form 16D issued by the plaintiff was defective, null and void, in that, the rate of interest imposed by the plaintiff was wrong. The defendant in its affidavit in reply argued that in the letter of offer by the plaintiff, the defendant was accorded with various types of facilities including overdraft facilities which carried different rates of interest. In issuing the Form 16D, the rate of interest claimed by the plaintiff differed from the rate as stated in the letter of offer. The defendant also argued that the plaintiff had no right to impose the 1% penalty interest. The amount demanded in Form 16D was unclear as it included the said penalty interest. In reply to the defendant' s arguments above, the plaintiff was not bound to give any statement of account relating to its claim, the interest rate applied was correct and it was within its power to impose the additional 1% penalty interest. The plaintiff filed ten affidavits in support of its claim but none contained the defendant's objections as to the uncertainty of the figure in Form 16D. The issues for the court were: (1) whether the amount stated by the plaintiff in the notice of demand in Form 16D was correct; and (2) whether there exists cause to the contrary under s 256(3) of the National Land Code 1965.

precedent for an order for sale in that the notice in Form 16D does not state the amount lawfully due under the charge. The defendant has shown a cause to the contrary under s 256(3) of the National Land Code 1965 and the plaintiff's application for an order of sale ought to be refused. Accordingly, the plaintiff's application is hereby dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Janani Suntharalingam

dalam surat tawaran yang dibuat oleh plaintif, defendan diberikan berbagai kemudahan termasuklah kemudahan overdraf yang mana mempunyai kadar faedah yang berlainan. Semasa mengeluarkan Borang 16D, kadar faedah yang dituntut oleh plaintif berlainan dari kadar yang dinyatakan di dalam surat tawaran tersebut. Defendan juga menghujahkan bahawa plaintif tidak mempunyai hak untuk mengenakan 1% faedah penalti. Jumlah yang dituntut di dalam Borang 16D adalah tidak jelas kerana ia termasuk faedah penalti tersebut. Dalam menjawab hujahan defendan, plaintif tidak terikat untuk memberi sebarang pernyataan akaun berhubung dengan tuntutannya, kadar faedah yang digunapakai adalah betul dan ianya adalah di dalam bidang kuasa plaintif untuk mengenakan faedah penalti tambahan sebanyak 1%. Plaintif memfailkan sepuluh afidavit-afidavit bagi menyokong tuntutannya tetapi tiada satu pun yang mengandungi bantahan-bantahan defendan berhubung dengan ketidakpastian jumlah dalam Borang 16D. Isu-isu di hadapan mahkamah adalah: (1) sama ada jumlah yang dinyatakan oleh plaintif di dalam notis tuntutan dalam Borang 16D adalah betul; dan (2) sama ada terdapat kausa bertentangan di bawah s 256(3) Kanun Tanah Negara 1965.

Diputuskan, permohonan plaintif ditolak dengan kos:

(1) Walaupun plaintif tidak diharapkan untuk memberikan satu pernyataan akaun yang terperinci berhubung dengan tuntutannya dalam Borang 16D, ianya sudah menjadi undang-undang yang tersedia maklum bahawa jumlah tepat yang dituntut pemegang gadai patut dinyatakan di dalam notis tuntutan. Jumlah tepat yang dituntut di dalam notis tersebut mestilah jumlah tertunggak dan kena dibayar yang betul kepada plaintif sebagaimana yang dikira pada terma-terma yang betul dan kadar faedah yang betul sebagaimana yang telah dipersetujui di antara pihak-pihak. Ini adalah untuk memberitahu penggadai jumlah yang sebenar dan sebetulnya yang perlu dibayar oleh penggadai untuk menebus hartanah tersebut. Keseluruhan jumlah yang tertunggak dan kena dibayar kepada plaintif iaitu sebanyak RM3,862,530.05 dikira pada kadar 2.5% setahun yang mana berbeza dari kadar faedah sepertimana yang dinyatakan di dalam surat tawaran tersebut. Kadar faedah yang berbeza yang dinyatakan di dalam surat tawaran tersebut merujuk kepada kemudahan yang lain dan bukan hanya kadar tetap 2.5% setahun sebagaimana dalam notis tuntutan dalam Borang 16D. Afidavit sokongan plaintif tidak menunjukkan kadar faedah bagi tuntutan yang dibuat dalam Borang 16D. Ini menimbulkan kesangsian pada pihak defendan (lihat perenggan 5).

(2) Bantahan defendan berhubung jumlah yang dinyatakan di dalam notis tuntutan adalah bermerit. Ini adalah kerana jumlah RM3,862,530.05 itu dipersoalkan dan tidak jelas, pemfailan sepuluh afidavit-afidavit yang mengira jumlah tertunggak dan kena bayar pada tarikh-tarikh tersebut tidak memberi apa-apa kesan. Plaintif gagal untuk menyatakan jumlah tertunggak yang betul dan faedah yang dikenakan dibawah gadaian tersebut (lihat *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283). Oleh yang demikian, defendan telah berjaya menunjukkan bahawa plaintif pemegang gadai gagal untuk memenuhi pra-syarat-pra-syarat untuk perintah untuk jualan (notis dalam Borang 16D tidak menyatakan jumlah yang kena

bayar di sisi undang-undang). Maka, permohonan plaintif untuk perintah untuk jualan wajar ditolak kerana defendan telah menunjukkan kausa bertentangan di bawah s 256(3) Kanun Tanah Negara (lihat perenggan 6–8).]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

For cases on notice of demand, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2235–2254.

Cases referred to

Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia [2003] 4 MLJ 409 (refd)

Legislation referred to

National Land Code 1965 s 256(3), Form 16D

Elizabeth Regina Wong (Wong Lu Peen & Tunku Alina) for the plaintiff.

Vincent Tey Wei Seng (Ranjit Ooi & Robert Low) for the defendant.

Balia Yusof J:

[1] The plaintiff applied for an order for sale of the defendant's property and the defendant claims that the said application is bad in law and ought not to be granted. The defendant claims it has shown cause to the contrary in opposing the application.

[2] The defendant's land was charged to the plaintiff on 12 August 1999 as a security for the repayment to Malayan Banking Berhad for all monies owing for the facilities provided to the defendant totalling RM3,750,000. Exhibit MBB1 in encl 2 is the letter of offer enclosed in the plaintiff's affidavit in support of this application and it states the various types of facilities granted to the defendant. Paragraph 4 of encl 2 which is reflective of the terms provided in the letter of offer (exh MBB1) sets out as follows:

Kemudahan	Tahap [RM]	Kadar Faedah Berkuatkuasa	
	Overdraft	450,000	2.25% setahun atas Kadar Pinjaman Asas* pada dasar kiraan harian

Tradeline Facilities Package 1	Letter of Credit (LC)	1,300,000	Association of Banks in Malaysia rate
	Trusts Receipts (TR)		8.5% setahun
	Bank Acceptance (BA)		8.5% setahun
Tradeline Facilities Package 2	Letter of Credit (LC)	2,000,000	Association of Banks in Malaysia rate
	Trusts Receipts (TR)		2.00% setahun atas Kadar Pinjaman Asas*
	Bank Acceptance(BA)		2.00% setahun atas Komisyen Penerimaan

* Kadar Pinjaman Asas semasa ialah 6.00% setahun berkuatkuasa dari 23 May 2003.

[3] In issuing the notice of default with respect to the charge in Form 16D, the plaintiff indicated (exh MBB6 in encl 2) as at 31 August 2003, the amount due and owing to the plaintiff is RM3,862,530.35 and the prescribed interest rate was put at 2.25% pa above the base lending rate on daily rest. Over and above that, the plaintiff also imposed a penalty interest of 1% per annum over and above the aforesaid prescribed interest rate on the entire outstanding amount from the date of default until full settlement subject to a minimum charge of RM5. It is to be noted at this stage that the plaintiff has the right to impose the additional 1% penalty interest as was clearly stated in the plaintiff's letter of offer dated 20 December 2001.

[4] The challenge put up by the defendant was premised on the ground that the Form 16D issued by the plaintiff was defective, null and void and the defendant further disputed that the amount stated therein on the ground that the rate of interest imposed by the plaintiff was wrong. The defendant filed an affidavit in reply via encl 9 and through the same had clearly demonstrated before this court that in the letter of offer by the plaintiff, the defendant was accorded with various types of facilities including overdraft facilities which carried with it different rates of interest. However, in issuing the Form 16D as exhibited in exh MBB6 of encl 2, the rate of interest sought to be claimed by the plaintiff differed from the rate as stated in the letter of offer exhibited as exh MBB1 of the same enclosure. The defendant also contended that the plaintiff had no right to impose the 1% penalty interest and further claimed that the amount demanded in Form 16D is unclear as to whether it had included the said penalty interest. On the defendant's objection to the additional 1% interest imposed, I do not think there is any merit in its argument as the plaintiff had the right to do so as per the terms and conditions mentioned in the letter of offer and furthermore the plain reading of the said Form 16D leaves no doubt whatsoever.

[5] In reply to encl 9, the plaintiff had filed encl 10 contending that the plaintiff was not bound to give any statement of account relating to its claim in Form 16D

and mentioned that the interest rate applied was correct and it was within its power to impose the additional 1% penalty interest. It is to be noted that the plaintiff filed altogether ten affidavits in support of its claim but none of these did address the objection of the defendant as to the uncertainty of how the figure stated in Form 16D was arrived at. While it is not expected for the plaintiff to give a detailed statement of account as to its claim in Form 16D, it is trite law that the precise amount claimed by a chargee should be stated in the notice of demand. I take it that the precise amount claimed in the notice must be the correct amount due and owing to the plaintiff as calculated on the right terms and the correct rate of interest as agreed between the parties. The whole idea behind this is simply to let the chargor know the actual and correct figure that he had to pay in order to redeem the said property (see *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409). From my reading of the Form 16D served on the defendant, it is clear that the sum of RM3,862,530.05 due and owing to the plaintiff was computed at the prescribed interest rate of 2.5% per annum above the base lending rate of 6% on daily rest. It appears that the whole amount due and owing to the plaintiff was computed at the stated rate of 2.5% per annum which differed from the interest rates as stated in the letter of offer. The different interest rates stated in the letter of offer refers to the different facilities and not just a flat rate of 2.5% pa as stated in the notice of demand in Form 16D. The plaintiff's affidavit in support at encl 2 do not indicate at what interest rate the sum claimed in Form 16D was arrived at even though paragraph 4 of the same provides for three different rates for the various types of facilities accorded to the defendant. This leaves the defendant very much in a state of doubt.

[6] In light of the above stated facts, I found there are merits in the defendant's objection to the amount stated in the notice of demand. In an action of this nature, the defendant chargor had merely to show cause to the contrary within s 256(3) of the National Land Code 1965 and among the many ways which he can do so is to show this court that the notice demands a sum which is not lawfully due to the chargee (see *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77).

[7] Although as I have said earlier, the plaintiff had filed a total of ten affidavits stating the amount due and owing at the various dates of the affidavits, those computations were based on the original amount of RM3,862,530.05 stated in the notice of demand in Form 16D . Since that figure is in the first place being questioned and remained ambiguous, the filing of the subsequent affidavits computing the amount due and owing at those dates of the affidavits are of no use and in. They do not in any way explain or certify that the amount claimed at the very first instance is correct. The defendant had therefore lost the opportunity to satisfy itself of the correctness of the amount claimed by the plaintiff. It is unable to challenge it and show how much it admits owing the plaintiff. There is a failure of the plaintiff in this case to state the exact and correct amount outstanding and the interest charged under the said charge (see *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283).

[8] In the circumstances of the case, I am of the view that the defendant had succeeded in demonstrating that the chargee had failed to meet the conditions

precedent for an order for sale in that the notice in Form 16D does not state the amount lawfully due under the charge. The defendant has shown a cause to the contrary under s 256(3) of the National Land Code 1965 and the plaintiff's application for an order of sale ought to be refused. Accordingly, the plaintiff's application is hereby dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Janani Suntharalingam